Lea Industries *and* Patricia Watkins Green

Upholsterers International Union of North America, AFL-CIO, Local 335 *and* Patricia Watkins Green. Cases 11-CA-9628 and 11-CB-970

May 28, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On January 8, 1982, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and supporting briefs, and the Charging Party filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent Union (hereinafter called the Union) violated Section 8(b)(1)(A) of the Act by failing to file and process a grievance on behalf of Charging Party Green because she was not a member of the Union. As discussed below, we agree with this finding. The Administrative Law Judge further found that Respondent Employer (hereinafter called the Company) violated Section 8(a)(3) and (1) of the Act by its full participation and complicity in the Union's unlawful conduct and by failing to reinstate the Charging Party. Contrary to the Administrative Law Judge, we find that the Company did not violate Section 8(a)(3) and (1).

The essential facts of this case, as found by the Administrative Law Judge, are as follows. On Friday, August 15, 1980,[2] employees Green, Swallows, Jones, and Barnett lunched together in the Company's parking lot. During a discussion about Barnett's pending grievance concerning her recently completed layoff, Green asked whether Barnett had said the day before that Green had not been laid off because she was providing sexual favors to a supervisor. When Barnett admitted that she had, Green asserted that Barnett's husband engaged in sexual conduct with Swallows. Swallows slapped Green, and Green proposed leaving the company property to fight. Swallows again slapped Green, then turned and walked away. Green, infuriated, followed Swallows and kicked her in the back. The two then fought for about 4 minutes.

Later that day, Personnel Manager Rogalski summoned Green and Swallows to separate meetings to talk about the incident. Rogalski, in another meeting at which both Green and Swallows were present, stated that witnesses to the incident to whom he had spoken gave conflicting accounts, and that, because he could not establish who struck the first blow, he had no recourse but to fire them both. He advised them that they could come in on Monday to meet with the grievance committee if they wished to file a grievance. At the end of the day, Green and Swallows met at the timeclock. Green accused Swallows of lying and warned that she would sooner or later "beat the hell out of you."

On Monday, August 18, Green telephoned the plant about filing a grievance. The secretary told her to meet with the grievance committee that day. When she arrived at the plant, Rogalski asked her whether she was there to file a grievance. She replied affirmatively, and he responded that she would need to meet with the grievance committee in the cafeteria. She then spoke with employees Nolan and Caldwell about filing a grievance. Nolan said she would have to see Union Secretary Cogdill. When Green told Cogdill she was there to file a grievance, Cogdill replied, "We'll take care of it . . . just go up to the cafeteria and wait for me."

Swallows, who was also at the plant on August 18, met first with employees Clements, Nolan, Caldwell, and Union Secretary Cogdill[3] in the cafeteria. Later, Green met with the same people and gave them her version of the August 15 incident. Green understood that she was meeting with the grievance committee. In fact, the four individuals comprise the Union's grievance committee. Green left the plant believing that she had filed a grievance.

Swallows returned to work on August 27.[4] Around that time Green learned that the Company had reinstated Swallows. Green went to the plant to inquire about her grievance and was informed that no written grievance had been filed on her behalf. When she asked Cogdill why he had not filed her grievance, he answered, "That's not normally my duty." She then spoke with Rogalski,

[1] Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] All dates hereinafter refer to 1980, unless otherwise indicated.

[3] Cogdill, apparently, is also an employee.

[4] The record indicates that a written grievance was filed on her behalf on August 20, and that the Company and the Union met to discuss the grievance on August 22.

who explained that he could not rehire her because he had received no written grievance regarding her. When she reminded him that she had said she wanted to file a grievance, he added that, even if she had filed one, it would not have mattered because he and Cogdill had discussed the situation and decided that Swallows would be rehired.

Relying primarily on the difference in representation accorded union member Swallows and union opponent Green, the Administrative Law Judge found, and we agree, that the Union's conduct in this matter constituted a violation of Section 8(b)(1)(A). We also note in particular that Green came to the plant on August 18 to file a grievance, told union grievance committee members Nolan and Caldwell that she wanted to file a grievance, and Union Secretary Cogdill assured her when she told him she was at the plant to file a grievance that he would "take care of it." Such circumstances support a conclusion that the Union knew Green wished to file a grievance and that the Union misled her into believing, to her detriment, that the Union was pursuing her grievance.

The Administrative Law Judge also found that the facts clearly showed Swallows rather than Green was the aggressor in the August 15 fight and that the Company was aware Swallows instigated the fight. He further found that the reasons advanced by the Company for rehiring Swallows but not Green were unsubstantiated, shifting, and belated. On the basis of these findings, he concluded that the Company knowingly acquiesced in the Union's unlawful course of conduct and, in so doing (and by refusing to reinstate her), discriminated against Green in a manner intended to encourage union membership. We reverse.

In general, to sustain an 8(a)(3) allegation, the General Counsel must establish that the employer had knowledge of the alleged discriminatee's union activity. We do not believe the record establishes such knowledge. While the Administrative Law Judge found that Green made clear to union supporters and coworkers her unwillingness to join the Union, he did not mention this fact in concluding that the Company knowingly acquiesced in the Union's disparate treatment of Green. After careful review of the entire record, we conclude that there is no basis for imputing to the Company knowledge of Green's antiunion stance. Her testimony concerning her union activity related to her encounter in a company bathroom with some coworkers, including Nolan (a union officer). Examination of her by counsel and the Administrative Law Judge failed to reveal that the Company knew of this encounter, and failed to disclose any other grounds on which to base a finding that the Company was aware of her antiunion position. Accordingly, we conclude that the General Counsel has not met his burden of establishing by the necessary preponderance of the evidence that the refusal to reinstate Green was unlawfully motivated.[5]

We shall therefore dismiss the 8(a)(3) and (1) complaint against the Company. Consequently, having found that the Union discriminated against the Charging Party in violation of Section 8(b)(1)(A), we shall modify the Administrative Law Judge's remedy and recommended Order to conform with our standard remedy in such cases. See *Laborers International Union of North America, Local 324, AFL-CIO (Center Homes of California, Incorporated)*, 234 NLRB 367 (1978).

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 4, and renumber the subsequent Conclusions of Law accordingly.

AMENDED REMEDY

Having found that Respondent Union has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

Because of Respondent Union's unlawful conduct, whether Charging Party Green's grievance would have been found meritorious is uncertain. Where, as here, resolution of that uncertainty is required for the determination of monetary responsibility, it is proper to resolve the question in favor of the injured employee and not the wrongdoer. Moreover, the other participant, Swallows, was reinstated. Accordingly, for the purposes of remedy, we shall presume that the Charging Party's grievance, if properly filed and fairly and impartially processed, would have been found to be meritorious and would have resulted in her reinstatement on August 27, 1980, which is the date employee Swallows was reinstated.

Respondent Union's backpay liability must be limited to any loss Green suffered as a result of the failure and refusal to file and process her grievance. That grievance now appears to be time-barred under the terms of the applicable collective-bargaining agreement, but Respondent Union may be able to prevail upon Lea Industries to waive those time limits. Accordingly, we shall order Re-

[5] We note in passing that the circumstances herein raise some suspicions concerning the Company's asserted reasons for its conduct. However, mere suspicion cannot substitute for proof of an unlawful labor practice. Absent proof of unlawful motivation, even assuming that, as the Administrative Law Judge implied, the Company's refusal to reinstate Green was not for "just cause," we cannot substitute our judgment for the Company's determination.

spondent Union to make Green whole for any loss of earnings she may have suffered from August 27, 1980, until the earlier of the following occurs: Respondent Union secures consideration of her grievance by Lea Industries and thereafter pursues it in good faith and with all due diligence, or Green is reinstated by Lea Industries or obtains substantially equivalent employment. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and interest thereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Upholsterers International Union of North America, AFL-CIO, Local 335, Philadelphia, Pennsylvania, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Failing and refusing to give all employees of Respondent Lea Industries, who are employed in the bargaining unit for which it is the recognized bargaining agent, full, fair, and equal representation as their collective-bargaining agent, even though such employees are not members of Respondent Union.

(b) Failing and refusing to file or process a grievance on behalf of any such employees because they are not members of Respondent Union.

(c) In any like or related manner restraining or coercing employees of Respondent Lea Industries in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Request Respondent Lea Industries to reinstate Patricia Watkins Green to her former position or, if it no longer exists, to a substantially equivalent position. If Respondent Lea Industries refuses to reinstate her, ask it to consider a grievance over her August 15, 1980, discharge and thereafter pursue her grievance in good faith with all due diligence.

(b) Make Patricia Watkins Green whole for any loss of earnings she may have suffered as a result of the failure and refusal to file and process her grievance from August 27, 1980, until such time as she is reinstated by Respondent Lea Industries or obtains other substantially equivalent employment or Respondent Union secures consideration of her grievance by Respondent Lea Industries and thereafter pursues it with all due diligence, whichever is sooner, together with interest, all to be computed in the manner set forth in the section of this Decision entitled "Amended Remedy."

(c) Post at its offices, facilities, and meeting places copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent Union's authorized representative, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint in Case 11-CA-9628 be, and it hereby is, dismissed in its entirety.

[6] Member Jenkins would award interest on the backpay in accordance with the formula set forth in his dissent in *Olympic Medical Corporation*, 250 NLRB 145 (1980).

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT fail or refuse to give to all employees of Lea Industries, who are employed in the bargaining unit for which we are the recognized bargaining agent, full, fair, and equal representation as their collective-bargaining agent, even though such employees are not members of our Union.

WE WILL NOT fail or refuse to file or process grievances on behalf of any such employees because they are not members of our Union.

WE WILL NOT in any like or related manner restrain or coerce employees of Lea Industries in the exercise of the rights guaranteed to them in Section 7 of the National Labor Relations Act.

WE WILL request Lea Industries to reinstate Patricia Watkins Green to her former position

or, if it no longer exists, to a substantially equivalent position. If Lea Industries refuses to reinstate her, WE WILL ask it to consider a grievance over her August 15, 1980, discharge, and thereafter WE WILL pursue her grievance in good faith with all due diligence.

WE WILL make Patricia Watkins Green whole for any loss of earnings she may have suffered as a result of our failure to file and process her grievance, with interest.

UPHOLSTERERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 335

DECISION

FRANK H. ITKIN, Administrative Law Judge. The unfair labor practice charges in the above consolidated cases were filed on January 7, a complaint issued on February 20, and a hearing was conducted in Waynesville, North Carolina, on October 20, 1981. Respondent Company and Respondent Union are parties to a collective-bargaining contract for a unit consisting of the Employer's production and maintenance employees at its factory in Waynesville, North Carolina. The contract (G.C. Exh. 2) contains grievance and arbitration procedures. On August 15, 1980, unit employees Patricia Watkins Green[1] and Sandra Swallows, while having their lunch in the Employer's parking lot, engaged in a fight. Management subsequently terminated both employees for their misconduct. Employee Swallows was a member of the Union. Employee Green was not a member of the Union. The Union filed a grievance on behalf of employee Swallows resulting in her reinstatement. No grievance was filed on behalf of employee Green. The General Counsel alleges that Respondent Union, by its conduct in this case, failed to represent employee Green for reasons which are unfair, arbitrary, invidious, and in derogation of its fiduciary obligation, in violation of Section 8(b)(1)(A) of the National Labor Relations Act. The General Counsel further alleges that Respondent Employer, by its related conduct, also impinged upon employee Green's Section 7 rights, in violation of Section 8(a)(1) and (3) of the Act. Both Respondent Union and Respondent Employer deny that they have violated the Act as alleged. Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed, I make the following:

FINDINGS OF FACT

Respondent Company is admittedly an employer engaged in commerce and meets the jurisdictional standards of the Board, as alleged. Respondent Union is admittedly a labor organization, as alleged. The evidence pertaining to the firing and denial of reinstatement of employee Green is summarized below.

[1] The caption and pleadings have been amended to show that the Charging Party's name is now Patricia Watkins Green.

Employee Green testified that she worked for the Company as a machine room helper from December 1979 until August 15, 1980; that she did not become a member of the Union; and that she repeatedly made clear to union supporters and coworkers her unwillingness to become a member of the Union. Green recalled that during July 1980:

> It was really a hot day . . . it was like 115 in the plant . . . and I said to Faye [Jones], don't tell me you think I ought to join the Union in a place with this kind of working conditions . . . we sweat like pigs in there . . . people have worked here for 20 years and make six dollars an hour . . . they don't have a Union.

Frances Nolan, a union supporter and representative, was also present during the above conversation; Nolan "defended" the Union.

Employee Green went to work during the morning of Friday, August 15, 1980. At 11 a.m. she had lunch in coworker Faye Jones' automobile in the plant parking lot. Present in the automobile were employees Green and Jones and coworkers Maria Barnett and Sandra Swallows. While having lunch, the employees discussed Barnett's pending grievance concerning Barnett's previous layoff. As Green testified:

> Barnett had some complaint that I [Green] should have been laid off instead due to the fact I had less seniority. . . . That's what the conversation was about. She [Barnett] had been filing a grievance on this accord, and the day before they had a grievance committee meeting of some sort, and I understood that certain things were said about Faye Jones and myself.

Green explained:

> I [Green] asked Maria [Barnett], had she said the day before that Faye and I received special favors from [company representative] Bill Rogers, and she said yes, she said that. I asked her, did she say that Bill knew where to get his nooky and that's why I wasn't laid off, and that Faye got special favors. She said, yes she had said that.

Green then told Barnett that she, Green, "hated her"; "everybody here hates you"; and "the only person that even talks to" Barnett is Swallows and "we know why Sandra talks to you."

According to Green, at this point, employee Swallows spoke up and said: "I'm not in this." Green responded: "All this was said in your house. . . ." Swallows replied: "but I didn't say anything to anybody." The argument continued. Green ultimately "told Maria [Barnett], you should find out where your husband gets his nooky before you worry about what I do with mine. . . ." Apparently, during this verbal exchange, Green had in some manner implied or suggested that coworker Barnett's husband had engaged in sexual conduct with employee Swallows. Consequently, as Green further testified:

> Sandra Swallows got of the car, went around to the front, and then she came back to my door. . . . [Swallows] said, I want to know what you are accusing me of.

Green replied: "I wasn't trying to accuse her of anything"—"I'm not trying to imply anything, have you got guilt feelings?" Whereupon, Swallows repeatedly slapped Green on her face. Green then got out of the automobile and invited Swallows to leave the Company's property and "we'll have a fight." The two argued over when such a fight should be held. Swallows again slapped Green's face and "started to walk off." Green, however, "stepped in her path" and invited a "fight now." Swallows "walked past" Green, and Green "kicked her in the back." Then, as Green further related, "we had a fight" which lasted 4 minutes.

Later that day, Friday, August 15, employee Green was summoned to a meeting with Personnel Manager Charles Rogalski. Present were Rogalski, Rogers, and Carroll Sheehan. Rogalski questioned Green about the "scuffle," and Green related her version of the incident, as detailed above. Later that same day, Green was again summoned to meet with Rogalski. Present were Rogalski, Swallows, Rogers, and Dalthard Webb.[2] According to Green:

> Mr. Rogalski . . . told us that they'd had conflicting stories from witnesses and could not establish who had struck the first lick; therefore, he could see no recourse but to discharge both of us. He said that if we wanted to file a grievance we could come in on Monday morning and speak to the grievance committee.

Green admittedly told Rogalski, "at that point . . . that he could take his job and stick it . . . and left the room."[3]

On the following Monday morning, August 18, employee Green, as she further testified, telephoned secretary Sherry Allen at the plant and said "I'd like to come in and file a grievance. Allen advised Green "to be there at 11 and . . . meet with the grievance committee." Green went to the plant at 11 a.m. She went to Rogalski's office. Rogalski asked her "are you here to file a grievance"; she responded yes; and he said "you'll need to meet with the grievance committee in the cafeteria."

Employee Green observed a coworker identified by her as "Geraldine" in the "break room." Geraldine was a member of the Union's "grievance committee." Green also saw employee Frances Nolan, a union representative, present in the room, "and Sandra Swallows was sitting between them." Green asked, "who do I talk to about filing a grievance," and Nolan said: "I guess you talk to Danny Cogdill." Green then went looking for Cogdill. Green later had the following conversation with Cogdill, the Union's recording and corresponding secretary:

> I [Green] said, Danny, I'm here to file a grievance or whatever it is I'm supposed to do . . . . And he said, we'll take care of it in just a few minutes . . . just go up to the cafeteria and wait for me . . . .

Green, as she testified, then went to the cafeteria. Cogdill and "the grievance committee" went into the cafeteria. Willard Clements, the Union's president, "came out and got Sandra Swallows first." Later, Clements "came out" and brought Green before "what [Green] understood to be the grievance committee." Present were Clements, Nolan, Geraldine Caldwell, Cogdill, and Green. There, Green related her version of the incident "and left assuming that [she] had filed a grievance." Green explained: "I had asked Mr. Cogdill, he said we'll take care of it, and I went in and was asked my story."

Subsequently, on or about August 27, employee Green was informed that the Company had reinstated employee Swallows. Green was later apprised by secretary Sherry Allen that a "signed" "written grievance" had not been filed on her behalf and "if you didn't sign anything you don't have a grievance filed." Green spoke with union representative Cogdill. Green testified:

> I said, Danny, why did you not file my grievance? He said, that's not normally my duty. I said, you told me you'd take care of it, why didn't you file a grievance? He answered, that's not ordinarily my duty.

Employee Green subsequently met with Rogalski, Cogdill, and Sherman Crawford. She again asked Cogdill why he had not filed a grievance as promised and he again responded, "this is not normally my duty." Rogalski then explained to Green: "Patti, I couldn't rehire you because I didn't have any written grievance." Later, however, Rogalski added: "it would not have mattered if you'd filed a grievance or not; Danny [Cogdill] and I had discussed it and we'd already decided that Sandra would be the one to come back to work." Rogalski claimed that management had "six witnesses that say they saw you hit Sandra first." Rogalski would not identify these witnesses. Green had never been informed by a company or union official that a grievance had "to be in writing."

Employee Sandra Swallows related a different version of the August 15 incident. Swallows claimed that, while having lunch on August 15, employee Jones asked employee Barnett "what had happened at the grievance meeting the day before." An argument ensued between employees Jones and Green and Barnett and Green:

> . . . turned around in the seat . . . and she said "if Maria [Barnett] would find out who Don was sleeping with she would find out why I [Swallows] wasn't opening my mouth or saying anything."

According to Swallows, ". . . I got out" of the automobile "and I apologized to Faye [Jones] for the argument in her car." Swallows claimed that Green had made "a kind of swing or movement toward her" although, admittedly, there was no physical contact. Swal-

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[2] Both Webb and Sheehan were union stewards or representatives.

[3] Green also acknowledged confronting Swallows later that day near the timeclock and then accusing Swallows of lying. Green warned Swallows: "Sooner or later I'm going to beat the hell out of you."

lows further claimed that, as she was walking "back into the building," she was "kicked" or "hit in the back" by Green. Then, the "fight" started. As Swallows put it, "we got into it again."

Swallows later met with Rogalski, Rogers, and Sheehan and, subsequently, with Rogalski, Rogers, and Webb. Swallows related to them her version of the incident. Rogalski stated "that we had both been discharged." Webb, a union representative, "told us both that we had a right to file a grievance within five days." Rogalski "repeated the same thing." Swallows noted that Green was also "present" when the above statements were made. Swallows "talked to Bill Webb first and . . . to Danny Cogdill" about filing a grievance. Swallows explained: "They said they would draw up the papers. I would have to sign them."

Swallows returned to the plant on Monday, August 18. She met with, *inter alia*, Geraldine Caldwell, Cogdill, and Rogalski. Rogalski "said that we both were fighting . . . we both have to be discharged . . . ." and "we both had the right to file a grievance in five days." On cross-examination, Swallows acknowledged that her meeting on Monday was with the "grievance committee" and Union President Clements was present. She insisted that Rogalski also attended the meeting. In addition, Swallows acknowledged that on Friday, August 15, Green had "accused [Swallows] of sleeping" with "Maria's husband." Swallows nevertheless claimed that "I was not all that furious about it"; Green "kicked" her "in the back"; and a fight ensued. Swallows further recalled that she "talked with Geraldine Caldwell and Frances Nolan" before being recalled—"After they had drawn up the papers and had sent work by Maria that I had to sign the papers."

Employee Willa Fay Jones testified about the argument and confrontation in her car during lunch on August 15. Jones recalled telling Barnett: ". . . while you're trying to find out where all the nooky is going maybe you should watch about your own husband." Jones added: "Patti [Green] was also in the argument with Maria Barnett and myself because the things had been said about her too, and she was saying pretty much the same things as I was to Maria." According to Jones, Green also told Swallows that this dispute "was her business because it had all been said at her house." Then, as Jones recalled:

> Sandra [Swallows] asked Patti [Green] if she was trying . . . to accuse her of something. . . . She [Swallows] got out of the car and went around and hit Patti through the door. . . .

Green invited Swallows to leave the parking lot "and they would fight." Swallows started to return to the plant and Green "kicked her." A "scuffle" followed. Jones later related her version of the incident to representatives of management and the Union. As Jones explained, "I told [Rogalski], Sandra hit Patti first." Jones further testified that Union Representative Cogdill had assured her:

> . . . we're doing everything we can for both of them; whatever we do for one we will do for the other . . . .[4]

Maria Barnett, although present at the unfair labor practice hearing, did not testify. However, Ronald Shelton, a former employee of the Company, testified that he had witnessed Swallows repeatedly slap Green during their argument on August 15. Green then invited Swallows to leave the Company's parking lot and "fight." Swallows "hit her again," and Shelton "just left and went on back in the plant." Shelton later spoke with Rogalski. Shelton, at the time, was not asked by Rogalski "who started the fight" and did not "volunteer" this information. Shelton described the incident to Rogalski as "a scuffle"—"I didn't think it was that bad."[5]

Employee Glen Owenby testified that he had witnessed the August 15 incident in the plant parking lot. He had observed Swallows "going back to the plant" and Green "run up behind her and kicked her in the rear end." Then, the two fought for about 2 or 3 minutes. Owenby did not "know" what if anything had occurred between Swallows and Green "before," in the parked vehicle. Owenby did not then discuss the matter with Company Representative Rogalski. Further, employee Genevieve Parker testified that she too had witnessed the August 15 incident. Parker observed Green "give Sandra a big kick . . . in the behind." Parker, however, had not observed Swallows and Green while in or near the parked automobile. Parker also did not discuss the matter with Rogalski.

Union Secretary Danny Cogdill testified that on Monday, August 18, employee Green had requested "a meeting with the Company." Later that day, according to Cogdill, "four Union officers, Patti Watkins [Green] and Chuck Rogalski" conducted "a meeting." Cogdill claimed, *inter alia*, that Green did not "at any time" ask him "to file a grievance." Cogdill recalled that Swallows' steward, D. L. Webb, had "asked [him] to file a grievance for her." The Union's representatives subsequently met with the Company's representatives concerning Swallows' grievance on August 21. The Union "asked the Company to reinstate Sandra Swallows." According to Cogdill, Green "came in the plant" on or about August 27 and asked him "why [he] hadn't filed a grievance for her." Cogdill replied: "Patti you did not request a grievance." Cogdill acknowledged that the "four Union representatives" present at the August 18

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[4] Jones recalled that she had observed Green at the plant on Monday August 18, "she [Green] told me she had come to file a grievance"; and "she said that she told Danny to file a grievance for her . . . , Danny Cogdill." Further, Jones claimed that, in a discussion with Swallows following the August 15 incident, Jones asked Swallows "why did you lie, why did you tell them that Patti hit you first?" Swallows replied: "I had to keep my job." Swallows, in her testimony, although admitting that she had discussed the incident with Jones, denied that she had told Jones that she "lied."

[5] Shelton later spoke with Plant Superintendent Peter Prebble about the incident. Shelton then disclosed what he had seen and requested Prebble to reinstate Green. Prebble responded: "Patti [Green] didn't file a grievance . . . ." Shelton previously had spoken with Union Representative Cogdill, who had assured Shelton: "he'd thought they'd be fired, and if one of them came back both of them would."

"meeting" are "the people who are on the grievance committee."

Company Personnel Manager Charles Rogalski testified that he had been informed about the "fight" in the parking lot during the afternoon of August 15; that employee Barnett had complained to him about the fight accusing coworker Green of being the "aggressor"; that he then spoke to Supervisor Bill Rogers and requested an investigation; and that he later met with Green, Rogers, and Sheehan. During this meeting, Green related her version of the incident. Rogalski conducted a similar meeting with Swallows, Rogers, and Sheehan, where Swallows gave her version of the incident. Rogalski also interviewed Jones and Barnett. Jones' version of the incident supported Green. Barnett's version of the incident supported Swallows.[6] Rogalski also interviewed Shelton who said, "in his opinion it was nothing to be concerned about, no one was at fault, and nothing really happened." Rogalski spoke to no other employees at the time.[7]

Rogalski recalled that he informed Green and Swallows on August 15 that they "have every right to file a grievance." Rogalski, however, denied telling the two employees that they were "discharged." He claimed that no action was taken that day. (Cf. G.C. Exh. 7 and C.P. Exh. 1.) Rogalski further testified that on Monday August 18, both Green and Swallows "came into the plant." Rogalski "sat down with them" and "there were a few Union officials present." Rogalski then "discharged" the two employees for "fighting on Company property." Rogalski later met with the Union "regarding the reinstatement of Sandra Swallows," in response to a grievance filed on her behalf by the Union. Swallows then claimed "self-defense." Management subsequently decided to reinstate Swallows. Rogalski asserted that he had been apprised at or about the time of this grievance meeting of a verbal confrontation between Swallows and Green at the timeclock during the late afternoon of August 15. Rogalski assertedly interviewed witnesses about this incident. Rogalski testified that management, "looking at the whole picture," determined that Green "was without a doubt the aggressor" and therefore decided to reinstate Swallows. Rogalski testified regarding the timeclock incident, in part as follows:

> Q. (By Mr. Brown) Who were the witnesses that testified regarding the time clock incident?
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> A. Frank Griffin.
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> Q. Who was he?
>
> A. Employee in machine room, the same department where these employees were employed.
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> Q. Who else?
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> A. Probably 15 people that saw it, we talked to several of them.
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> Q. Did you talk to one, or five, or several?
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> A. Several.
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> Q. Who else?
>
> A. Me. personally, I don't recall talking to anyone except Frank Griffin.

In addition, Rogalski was asked: "Isn't it true that she [Green] told you she was there to file a grievance on August 18?" Rogalski responded: "I don't recall her saying that." Rogalski generally denied, *inter alia*, telling Green "that it would not have mattered" if a grievance had been "filed for her" since he "and Cogdill had agreed that Sandra would be the one to go back to work."

I credit the testimony of Green, Jones, and Shelton as recited and quoted above. Their testimony was forthright and complete. Further, their testimony was in significant part mutually corroborative. And, relying upon demeanor, they impressed me as reliable and trustworthy witnesses. I find, on this record, that Green, Jones, and Shelton have accurately and truthfully related the sequence of events culminating in the firing and subsequent denial of reinstatement of Green and, in particular, that they have accurately and truthfully related the conduct of and statements made by the participants in the above scenario. On the other hand, I do not credit Swallows' version of her August 15 confrontation with Green and related events. Swallows' testimony was at times incomplete and unclear. In addition, I note that—although management apparently relied upon Barnett's alleged version of the parking lot fight in belatedly labelling Green as the "aggressor" management and the Union did not call Barnett, present at the hearing, to provide corroboration for Swallows' testimony. In sum, I find here that Swallows did strike the first blows as Green, Jones, and Shelton credibly testified.[8]

Likewise, insofar as the testimony of Green, Jones, and Shelton differs with the testimony of Cogdill and Rogalski, I credit the testimony of the former witnesses as more detailed, accurate, and trustworthy. The testimony of Cogdill and Rogalski was at times incomplete, vague, evasive, and contradictory. Cogdill and Rogalski did not impress me as trustworthy witnesses. I note also that company secretary Sherry Allen, and union officials and grievance committee members Clemments, Nolan, and Caldwell, were not called as witnesses to explain or refute the various statements and conduct attributed to them by Green during her testimony.

Discussion

The General Counsel argues that a union acts in derogation of its fiduciary obligation to bargaining unit employees when it withholds fair and equal representation from them and refuses to process their grievances because they are not members of the union, in violation of Section 8(b)(1)(A) of the Act. See, generally, *Newport News Shipbuilding and Dry Dock Company*, 233 NLRB 1443, 1451 (1977), and cases cited. Respondent Union does not seriously dispute this proposition; instead, the Union contends that employee Green did not request

[6] As noted, Barnett, although present at the hearing, did not testify.

[7] Rogalski conducted a second meeting with the employees on August 15 with Union Representative Webb present instead of Sheehan. Apparently, Webb was the proper union representative or steward to attend such a meeting. At this second meeting, the employees repeated their earlier versions of the incident.

[8] As for the testimony of Owenby and Parker, it is clear that they did not witness the entire confrontation on August 15. Further, they were not even interviewed by Rogalski during his alleged effort to ascertain who was the "aggressor."

that a grievance be filed on her behalf and "it was certainly reasonable for the Union to conclude . . . that [Green] was not interested in regaining her job." The credible evidence of record is to the contrary.

Thus, as found *supra*, employee Green was not a union member. She made her dissatisfaction with the Union known to her coworkers, including Union Representative Nolan. Swallows, on the other hand, was a union member and attended union meetings. On Friday, August 15, Green and Swallows got into a fight in the plant parking lot. Management—after interviewing Green, Swallows, Jones, Barnett, and Shelton—"could not establish who had struck the first lick" and decided "to discharge both" employees. The two employees were told by Company Personnel Manager Rogalski that "if [they] wanted to file a grievance [they] could come in Monday morning and speak to the grievance committee." On Monday August 18, Green telephoned Company secretary Allen and told Allen that "I'd like to come in and file a grievance." Green was instructed to be at the plant at 11 a.m. Green then went to the plant. Company Personnel Manager Rogalski asked Green, "are you here to file a grievance?" and she said "yes." Rogalski instructed Green that she would "need to meet with the grievance committee in the cafeteria." Green later spoke to Union Representatives Nolan and Caldwell, who were seated in the breakroom with Swallows. Green asked Nolan: "who do I talk to about filing a grievance?" Nolan directed Green to Union Representative Cogdill. Green went looking for Cogdill. Green asked Cogdill "to file a grievance." Cogdill assured Green: ". . . we'll take care of it in a few minutes . . . just go up to the cafeteria and wait for me."

On that same day, Monday, August 18, Green appeared before what she believed to be the Union's "grievance committee." Indeed, the four union officials then present—Clemments, Caldwell, Nolan, and Cogdill—comprise the "grievance committee." Green related to this "committee" her version of the August 15 fight. She left "assuming that [she] had filed her grievance." Cogdill had told Green: ". . . we'll take care of it . . . ." However, the Union did not prepare and file such a grievance for Green. Instead, it filed a grievance for union member Swallows and supported Swallows' version of the fight before management. The Union did not apprise Green that it would take such a course of action. It was not until August 27, some 9 days after Green had appeared before the committee, that she was advised that Swallows had been reinstated and no timely grievance had been filed on her behalf.

Such conduct by Respondent Union falls far short of its fiduciary obligation to fairly and equally represent unit personnel. Respondent Union not only failed and refused to prepare and file a grievance for Green as promised, it also misled her into believing that it was pursuing her claim. I find that Respondent Union—in thus favoring Swallows while withholding fair and equal representation from Green—was not relying upon a good-faith determination that Green was in fact the "aggressor" on August 15. The credible evidence of record makes it clear that Swallows' conduct on August 15 was aggressive and Swallows had struck the first blows. The Union was aware of these facts.

In sum, I am persuaded here that the real reason why Respondent Union assisted Swallows and withheld the support and required representation from Green was the fact that Swallows was an active union member and supporter, whereas Green was not a member and had openly opposed the Union. Respondent Union therefore failed to represent Green fairly and equally for reasons which are unfair, arbitary, invidious, and in derogation of its fiduciary obligation, in violation of Section 8(b)(1)(A) of the Act.

I encounter greater difficulty in resolving the General Counsel's next contention that Respondent Company, by its related conduct, similarly violated Section 8(a)(3) and (1) of the Act, because of the required showing of animus which is necessary to support such a finding. See, generally, *Newport News Shipbuilding, supra*, 233 NLRB at 1453–54. However, on the particular facts of this record, I am persuaded that the Employer, by its full participation in the Union's unlawful treatment of employee Green and with full knowledge of the pertinent facts, became an accomplice with the Union to this disparate treatment of a nonunion member and, consequently, acquiesced in the discriminatory treatment of an employee for "Union related considerations." Cf. *Newport News Shipbuilding, ibid.*

Thus, as found *supra*, Personnel Manager Rogalski, after interviewing employees Green, Swallows, Shelton, Jones, and Barnett with respect to the August 15 parking lot fight, decided to fire both employees Green and Swallows because he could not resolve their "conflicting stories" and "establish who had struck the first lick." Management did not thereafter discover any new witnesses to the August 15 fight which caused it to belatedly change its position and label Green as the "aggressor." I note, in this respect, that employee Barnett, an eyewitness to the August 15 incident whose story was apparently relied upon by the Employer in making its determination, was not even called by the Employer as a witness to substantiate its shifting of position. Instead, the Employer produced two employees, Owenby and Parker, who not only did not witness the entire fight, but who also were not even interviewed by management before labelling Green as the "aggressor." Moreover, as found, the credible evidence of record shows that Swallows in fact "had struck the first lick."

The Employer, in a further attempt to justify its determination to reinstate Swallows and not Green, relies in part upon the brief verbal confrontation between Green and Swallows at the timeclock late Friday, August 15. Both employees had already been discharged. Green admittedly accused Swallows of lying to Rogalski, as she had, about the fight, and Green warned: "Sooner or later I'm going to beat the hell out of you." This brief exchange, in context, does not in my view support management's determination to reverse its earlier position that it could not decide which employee was the "aggressor" in the parking lot fight. And, although Rogalski—in an effort to amplify the Employer's alleged justification for its shift in position—claimed that "we talked to several"

of the "probably 15 people" who witnessed the exchange at the timeclock, he later admitted talking to only one such employee. Rogalski elsewhere later raised that to two employees; neither of these employees testified at this proceeding.

Management, in a further attempt to justify its position, argues that no grievance had been filed on employee Green's behalf. Indeed, employee Green credibly testified that Personnel Manager Rogalski, on or about August 27, similarly claimed to her: "Patti I couldn't rehire you because I didn't have any written grievance." Elsewhere, however, Rogalski told this employee: "it would not have mattered . . . Danny [Cogdill] and I had discussed it and we'd already decided that [Swallows] would be the one to come back." I note that previously, on August 18, Rogalski was fully aware that Green had appeared at the plant in order to file such a grievance and appear before the grievance committee.

Under all these circumstances, including management's unsubstantiated, shifting, and belated assertions for its refusal to reinstate employee Green, I find that the Company—although fully aware that employee Green was not the "aggressor" during the August 15 fight and fully aware that employee Green was at all times pertinent here attempting to pursue her grievance and regain her job—acquiesced in the Union's unlawful course of conduct, and reinstated Swallows instead of Green. The Company thereby became an accomplice in this unlawful disparate conduct, and as a result discriminated against employee Green in a manner intended to encourage union membership, in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Company is an employer engaged in commerce as alleged.
2. Respondent Union is a labor organization as alleged.
3. Respondent Union violated Section 8(b)(1)(A) of the Act by its failure and refusal to file and process a grievance on behalf of employee Green and to fairly and equally represent her, because she was not a member of the Union.
4. Respondent Company violated Section 8(a)(3) and (1) of the Act by its full participation and complicity in the above conduct and by its failure to reinstate employee Green on or about August 27, 1980.
5. The unfair labor practices found above affect commerce as alleged.[9]

REMEDY

To remedy the unfair labor practices found above, Respondent Company and Respondent Union will be directed to cease and desist from engaging in such conduct and like or related conduct, and to post the attached notices. Further, Respondent Company will be directed to offer reinstatement to employee Green to her former position or, in the event that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges. Further, since I find both Respondent Union and Respondent Company have acted together as accomplices in this unlawful and discriminatory conduct, they are *in pari delicto*, and they will be required to jointly and severally make employee Green whole for any loss of earnings suffered by reason of this discrimination, by making payment to her of a sum of money equal to that which she normally would have earned from the date of the discrimination, the refusal to reinstate her on or about August 27, 1980, to the date of Respondent Company's offer of reinstatement, less net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[10] Further, Respondent Company will preserve and make available to the Board, upon request, all payroll records and reports, and all other records necessary and useful to determine the amount of backpay due and the rights of reinstatement.

[Recommended Order omitted from publication.]

[9] The General Counsel has not sufficiently proven par. 9(a) of the complaint. This allegation is therefore dismissed.

[10] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).